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IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1981

NO.

J. RICHARD BARBER, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a state official's mere receipt of money or property from companies doing business with the state creates a presumption of compulsion which is sufficient by itself - absent a "convincing explanation" otherwise by the defendant - to meet the reasonable

doubt standard of proof for a Hobbs Act conviction for extortion under color of official right?

2. Whether a defendant, who testifies that he would have admitted certain undisputed facts if he had been asked at the beginning of the investigation, may be impeached through repeated questioning regarding his refusal, two years later, to appear before the grand jury which indicted him.

3. Whether the guilty pleas of a defendant's co-participants in an alleged scheme to defraud may be introduced at trial as substantive evidence of the defendant's guilt.

4. Whether a public official may be convicted under the mail fraud statute for depriving citizens of their right to the "honest and faithful performance of his duties",

without proof that that the alleged scheme influenced his judgment or decisions on official matters.

5. Whether a defendant, who discovers after trial that the government deliberately concealed information raising doubts about a juror's impartiality, is entitled to an evidentiary hearing to determine whether actual bias existed.

6. Whether a district court may instruct a jury, as a matter of law, that a state governmental office is an "enterprise" within the scope of the R.I.C.O. statute.

7. Where a defendant testifies under a grant of immunity and is later prosecuted by the same jurisdiction for conduct described in that testimony, whether the government's assertion that it developed its case

independently of the immunized testimony is sufficient to negate the presumption of taint.

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OPINIONS BELOW

The complete opinion of the United States Court of Appeals for the Fourth Circuit, printed in Appendix A hereto, is reported in 668 F.2d 778 (1982). The opinion of the United States District Court for the Southern District of West Virginia, filed on August 22, 1979 and printed in Appendix B hereto, which held that the office of the West Virginia Alcohol Beverage Control Commissioner could constitute an "enterprise" within the meaning of the R.I.C.O. statute (Title 18 U.S.C. section 1951), is reported in 476 F. Supp. 182 (1979).

The district court's findings of fact and conclusions of law with respect to the use immunity granted to petitioner, printed in Appendix C hereto, and the district court's findings with respect to the sufficiency of the government's proof

that it made no use of petitioner's immunized testimony in the present prosecution, printed in Appendix D hereto, were not published.

JURSIDICTION

Petitioner seeks review of a judgment of the United States Court of Appeals for the Fourth Circuit, which affirmed his conviction on all twenty counts of an indictment charging him with violations of the Hobbs Act, Title 18 U.S.C. section 1951, the Racketeer Influenced and Corrupt Organizations [hereinafter referred to as "R.I.C.O."] statute, Title 18 U.S.C. section 1962(c), and the federal mail fraud statute, Title 18 U.S.C. section 1341. The judgment of the Fourth Circuit was entered on January 14, 1982. A timely petition for rehearing was denied by an order of the court, printed in Appendix G hereto, which was entered on March 19,

1982. The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. section 1257.

STATUTES INVOLVED

The verbatim texts of the following statutes involved in this case are printed in Appendix F hereto: Mail Fraud, Title 18 U.S.C. section 1341; the Hobbs Act, Title 18 U.S.C. section 1951; and R.I.C.O., Title 18 U.S.C. sections 1961-1963.

STATEMENT OF THE CASE

A. The events leading to the indictment

The petitioner, J. Richard Barber, was Commissioner of the West Virginia Alcohol Beverage Control Commission from 1970 through 1976. In 1975, he was interviewed by F.B.I. agents and the then-United States Attorney for the Southern District of West Virginia, John Field, regarding his collection of

campaign contributions for Governor Arch Moore from liquor company representatives and others during the 1972 gubernatorial campaign. He later testified on the same subject before a federal grand jury which ultimately returned an indictment against Governor Moore. Both his grand jury testimony and the informal discussions with the F.B.I, and U. S. Attorney were governed by an informal grant of use immunity (App. C, pp. 69a-78a).

In December of 1976, agents of the Bureau of Alcohol, Tobacco and Firearms began an inspection of Barber's office records as part of an investigation into the expense accounts of some liquor company salesmen. During the course of their investigation, the B.A.T.F. agents apparently discussed with Barber his use of the so-called "withdrawal system", under which Barber and virtually all of his predecessors in office withdrew liquor from the state warehouse, distributed it

to various governmental offices and civic organizations, and then sent the manufacturers a form characterizing the withdrawn liquor as promotional samples and requesting that the state be credited with its purchase price.

In early 1977, Barber was succeeded in office by Patrick Boggs, who repeatedly asked the B.A.T.F. to continue its now-dormant investigation of Barber's conduct in office. Boggs also provided the B.A.T.F. agents with their first information concerning possibly illegal cash contributions made by liquor companies during Barber's tenure in office. The B.A.T.F. revived its investigation of Barber in November of 1977 and, in early 1978, turned the case over to the United States Attorney for the Southern District of West Virginia. On May 5 or 6, 1978, an F.B.I. agent assigned to the case obtained copies of two F.B.I. Form 302's which summarized Barber's

statements to the F.B.I. and U. S. Attorney during the Moore investigation, including the information that Barber had collected campaign contributions for Moore from liquor salesmen and others during the 1972 election, totaling "between $50,000 and $70,000 with 90-95% of this amount being in cash". During the next few months, these Form 302's were duplicated and distributed to virtually the entire prosecution team.

On May 3, 1978, a twenty count indictment was returned against Barber. Six counts charged that the liquor withdrawal system constituted extortion "under color of official right", in violation of the Hobbs Act, Title 18 U.S.C. section 1951. Thirteen counts charged that the withdrawal system constituted mail fraud. The remaining count charged that Barber had conducted an "enterprise" -- i.e., the office of the state Alcohol Beverage Control Commission

-- through a pattern of racketeering activities, to wit: (a) twelve charges based upon Barber's solicitation or receipt of campaign contributions during the 1972 gubernatorial campaign, six characterized as bribery and six characterized as extortion under color of official right; (b) sixteen charges of extortion under color of official right based upon the liquor withdrawal system; and (c) sixteen charges of bribery based upon cash payments allegedly made by one liquor company representative.[1]

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[1] At the close of the government's case, the district court dismissed nine of the R.I.C.O. predicate charges based upon Barber's solicitation or receipt of campaign contributions, on the grounds that the government's evidence regarding these charges was insufficient to establish bribery or extortion. Although the sixteen bribery charges which were unrelated to campaign contributions were submitted to the jury in support of the R.I.C.O. count, the Fourth Circuit Court of Appeals did not rule on petitioner's challenge to the sufficiency of the evidence supporting these charges, but simply held that "at least two" of the mail fraud and extortion charges which also served as R.I.C.O. predicates had been sufficiently proven, and would

B. The evidence at trial

1. The withdrawal system

The evidence presented at trial established that it was the practice of liquor companies nationally to provide large quantities of "samples" to customers for promotional purposes. In "control" states such as West Virginia, where the industry is regulated by a state liquor commission which is the sole retail distributor of alcoholic beverages, the distribution of these samples must be authorized by the state commission. In West Virginia, a "withdrawal form" (ABCC Form 180) was developed for this purpose. The withdrawal form, according to its pre-printed language, was a request by a liquor company representative to withdraw liquor from the state warehouse for distribution as samples, and was designed to be signed by the company representative

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support the R.I.C.O. conviction. App. A, p. 23a.

requesting the withdrawal and by the ABCC Commissioner authorizing it. Since the state was billed by the distilleries based upon the quantity of liquor products shipped to the state warehouse, all liquor withdrawn from the warehouse for sample distribution was listed on a "debit memorandum" which was sent to the distilleries, claiming a credit to the state's account for the purchase price of the withdrawn liquor.

From the inception of the West Virginia Alcohol Beverage Control Commission in 1935, the overwhelming majority of the companies doing business in West Viginia permitted a portion of the sample distribution to be initiated by the Commissioner himself. Either upon request by a governmental office or civic organization or at his own initiative, the Commissioner would authorize withdrawals from the state warehouse, arrange for distribution of the liquor, and then

request the companies' authorization for the state to receive a billing credit for the withdrawn liquor. Instead of developing new forms for these "Commissioner's withdrawals", the ABCC simply utilized the existing forms which had been developed for sample withdrawals by company representatives -- i.e., the "withdrawal forms" and debit memoranda. The withdrawal forms, signed by the Commissioner, would be presented to the company representatives, with or without a request for their signatures authorizing the withdrawals.[2]

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[2] During Barber's tenure in office, two of the distilleries, for undisclosed reasons, requested that withdrawals initiated by the Commissioner be recorded on a different form, a "breakage affidavit" normally used by the state to claim credit for broken or otherwise "unsaleable" merchandise. This was done, and two extortion counts and three mail fraud counts of the indictment were based upon the use of these breakage affidavits. All of the remaining charges concerning the liquor withdrawal system were based upon the use of the "withdrawal forms" described above.

This practice, which had received considerable public attention through the media in earlier years, was continued by Barber when he assumed office, as he readily admitted on direct examination at trial. Since Barber's operation of the withdrawal system was undisputed, the only real issue at trial concerned the proper characterization of the system -- i.e., whether, as the government contended, it constituted extortion of property, as well as a fraud on the liquor companies and the citizens of the state.

2. The companies' motivation

As the Fourth Circuit opinion affirming Barber's conviction acknowledges, "a majority of the companies considered the withdrawal practice to be a valid 'promotional' device" (App. A, p. 21a). Indeed, several of the company representatives called as government witnesses testified that, when Barber assumed office, they encouraged him to

continue distributing their companies' products through the withdrawal system. More importantly, of the fifteen liquor company representatives (all but one of whom were government witnesses) who testified regarding whether they felt any compulsion to authorize Barber's withdrawals, the overwhelming majority (eleven) stated that they felt no compulsion, and expected no benefits, with respect to their decision to approve the withdrawals. (Excerpts from this testimony are printed in Appendix H hereto.) Only four of the twenty-six liquor company representatives who testified at the trial stated that they felt any compulsion to participate in the withdrawal system. All four attributed this feeling solely to the hypothetical power of petitioner's office, and all denied that Barber had done anything to induce or exploit their feeling of compulsion.

3. The effect of the system

The liquor company witnesses uniformly testified that the withdrawal system did not represent a deceit practiced on their companies. They agreed that although the language of the withdrawal forms was technically false, in that the forms purported to be the companies' own requests to withdraw liquor for sample distribution whereas the forms were being used to request post hoc authorization for liquor which the Commissioner had withdrawn, the companies knew that the forms actually represented withdrawals made by the Commissioner.

A number of the witnesses testified that they viewed the withdrawal system as simply one method of sample distribution, and several stated that they believed the system provided the best possible promotional distribution of their companies' products.

There was absolutely no evidence that Barber displayed any partiality toward the liquor companies who participated in the withdrawal system, or that he threatened or practiced retribution toward those which did not. The unanimous testimony was that Barber was always "scrupulously" or "meticulously" fair in his dealings with all of the companies, and that the withdrawal system had no effect whatsoever upon the conduct of his other duties.

4. The campaign contributions

As noted earlier, see fn.1, supra, three of the R.I.C.O. predicate charges submitted to the jury were based upon Barber's solicitation of political contributions during the gubernatorial campaign of 1972. The three witnesses who testified regarding these contributions all stated that they felt no compulsion whatsoever to comply with Barber's requests, and did not expect any favored treatment if they did so. The witness who

authorized one of these contributions on behalf of Schenley Industries testified that he did so solely because it would help "bring about the election or the re-election [of Governor Moore] and the continuation of Mr. Barber as Commissioner, and as far as Schenley Industries were concerned . . . the entire system had changed to the benefit not only of our company ... but to the other companies as well... I was more concerned about the re-appointment of Mr. Barber because of the job he had done." The other two witnesses testified that they viewed the contributions as routine; one added that his company, like Schenley, was interested in ensuring Barber's re-appointment to office.

5. The government's use of Barber's immunized testimony

The district court conducted extensive hearings, both before and during the trial, concerning whether the

government had made any use of Barber's immunized testimony in the investigation which led to his indictment. As noted above, see page 5-6, supra, the evidence presented at these hearings established that, one year before Barber's indictment was returned, the F.B.I. agents assigned to the investigation had obtained copies of the F.B.I. forms summarizing his immunized testimony. In June of 1978, eleven months before the indictment was returned, the agents gave copies of the 302 forms to B.A.T.F. agents who were still working on the case, and to U. S. Attorney Robert King, Fields' successor in office (Pre-trial transcript, pp. 429, 450). During the following months, King repeated urged his assistants to read the statements[3]. In December of 1978,

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[3] In the fall of 1978, Assistant U.S. Attorney Feinberg was asked by King whether she had read the statements; when she replied that she had not, King handed her a copy to read (Id., pp. 1504-1507).

Assistant U.S. Attorney Rich was asked on two or three occasions whether he

King initiated an unsuccessful search within his office for a transcript of Barber's immunized grand jury testimony. The transcript, apparently misfiled, was located just before the start of the pre-trial hearings (Id., 1201).

The evidence presented at these hearings also established that in January or February of 1979, after discussing the possibility of "verifying whether any promises [of immunity] had been made in connection with the interview" of Barber by former U.S. Attorney Field, King and Assistant U.S. Attorney Betts made a conference call to Field (Id., pp. 1387-

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had read the statements; on one of these occasions, when Rich said that he had not, King unsuccessfully searched in his desk for a copy to give Rich (Id., p. 1426).

Assistant U.S. Attorney Betts was asked by King on three or four occasions whether she had read the statements (Id., pp. 1395-1396). On one occasion, King read aloud to her the portion of Barber's statement which detailed the amount of cash contributions collected by Barber during the 1972 campaign (Id., pp. 1387-1388).

1388). The substance of this conversation was not disclosed during the hearings. At approximately the same time, King asked George Adams, one of the F.B.I. agents working on the investigation, to contact the agent who had prepared the 302 forms "to ask him to contact [King's] office and to determine what his recollection was and what he understood about any promises made to Mr. Barber in the interview ... concerning possible immunity from prosecution and this type of thing" (Id., pp. 509-510). Adams did so, and reported "the result of our conversation" to King and Assistant U.S. Attorney Rich (Id.). Again, the substance of these conversations with the agent who had prepared the summaries, and who had been present during Barber's immunized interview, was not revealed.

At least three of the Assistant U.S. Attorneys and one F.B.I. agent involved in the Barber investigation had also held

those positions during the Moore investigation. One of these, Assistant U.S. Attorney Rich, was an active participant in the Moore trial, and served as King's chief assistant during the Barber investigation.[4]

The government agents and attorneys who testified during the pre-trial hearings uniformly stated that they had made no use of Barber's immunized statements. They testified that, independently of their early May, 1978 receipt of the F.B.I. form 302's, the investigation had focused upon possible cash payments, including campaign contributions, because this was a natural

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[4] Although Barber had been subpoenaed as a government witness for the Moore trial to testify regarding his collection and delivery to Moore of cash campaign contributions, the district judge conducting that trial, after protracted bench conferences concerning the issue at which both U.S. Attorney Field and Assistant U.S. Attorney Rich were present, ruled such evidence inadmissible. Accordingly, Barber did not testify at the trial. Governor Moore was ultimately acquitted of all charges.

part of any investigation of a state official.[5] The district court refused Barber's request that the government be required to negate the possibility that the source of the information regarding cash contributions which was given to the

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[5]They also testified that the following information regarding cash payments had been gathered before their receipt of the 302's:

- Patrick Boggs, Barber's successor in office, had provided the first information regarding possibly illegal cash payments, while attempting to persuade the B.A.T.F. to re-open its investigation in 1977. (Boggs, who at the time of the Moore investigation was an assistant prosecutor for the county in which the trial was conducted, did not testify in this case. Neither the substance of the information which he had provided the B.A.T.F., nor the source from which he had obtained the information, was revealed.)

- In March and April of 1978, a Hiram Walker representative informed the investigators that during Barber's tenure he had paid for some of Barber's travel expenses on several occasions and twice had given Barber $200 as a Christmas present.

B.A.T.F. by Patrick Boggs in 1977, and which was the first information received by any of the federal agencies involved in the Barber investigation, was Barber's immunized testimony.

C. The rulings below

1. The Hobbs Act presumption

At trial, the petitioner unsuccessfully moved for a judgment of acquital on all of the Hobbs Act charges, on the grounds that the government had failed to prove an essential element of the offense: i.e., that the liquor companies which had given campaign contributions to Barber, or which had

permitted him to withdraw their liquor products, had acted under "a reasonable feeling of compulsion."[6]

In considering this issue on appeal, the Fourth Circuit created a presumption to fill what it perceived as an absence of any evidence concerning whether or not the companies actually felt such compulsion:

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[6]The district court instructed the jury regarding this requirement as follows:

> Now, neither the mere voluntary payment of money, including political contributions whether solicited or not, nor the delivery of property, unaccompanied by any reasonable fear of economic loss, constitutes extortion, unless the payment or delivery was made under some form of compulsion or inducement by virtue of the defendant's office...[E]xtortion under color of official right by a public officer need not involve actual force or threat. But the person to be extorted must, under all the facts and circumstances of the case, acting as a reasonable and prudent person, have a reasonable belief or feeling that he is compelled to make a payment because of that public officer's wrongful use of his official position for the purpose of obtaining such payment... [Trial transcript, pp. 1767-1768].

> The giving of free liquor in substantial quantities is altogether contrary to custom, unless there is a reason, i.e., an expectation of a quid pro quo. When the "donee" is the state's alcoholic beverage chief, the conclusion is irresistible that, absent a convincing explanation, the "gift" was not a gift, but rather, was in return for favors or for the withholding of punitive measures. No such convincing explanation has been forthcoming here. Its absence provides an adequate basis for an inference that a true gift was not the purpose of the liquor companies, and that, as far as the liquor companies were concerned, there was nothing voluntary about the withdrawals...
>
> Hence, on the evidence, there was a fully adequate basis for a jury finding that the benefits accruing to Barber were not true gifts but rather were extracted, with the donors' consent, under color of official right.
>
> App. A, pp. 15a-17a.

In creating this presumption, and affirming Barber's convicton based on it, the court overlooked the following facts: (a) the Hobbs Act charges which served as predicate crimes for the R.I.C.O. count were based upon

solicitation of campaign contributions as well as the liquor withdrawal system;[7] (b) the evidence at trial established that "the giving of free liquor in substantial quantities" was altogether consistent with the liquor industry's promotional customs; and (c) the evidence at trial affirmatively established that most of the companies authorizing withdrawals in fact did not do so "in return for favors or for the withholding of punitive measures," see App. H.

2. The questions regarding petitioner's assertion of the Fifth Amendment privilege

On cross-examination, despite his earlier testimony that he had made withdrawals "from most all of the ... companies that were doing business in West

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[7] The court's opinion acknowledges that "other public policy objectives" might dictate against applying the court's presumption to a public official's solicitation of campaign contributions, App. A, p. 13a, but incorrectly states that the Hobbs Act charges in this case were based solely on the withdrawal system. Id., pp. 16a-17a.

Virginia," Barber was asked a series of questions designed to have him repeatedly "admit" to having withdrawn liquor from each of the companies listed in the indictment, one by one. In the midst of this line of questioning by the U. S. Attorney, and in direct response to a question concerning whether he had ever withdrawn products of the A. Smith Bowman Company, Barber responded: "I never denied that. Your people spent two years trying to get that information, and if they had came [sic.] to me the first day I would have told them." The government was then permitted to repeatedly question Barber regarding his refusal, two years after the investigation had begun and after he had been informed that he was the target of the grand jury which eventually indicted him, to appear before the grand jury.[8] (The text of this questioning is printed in Appendix H hereto, at p. 132a.)

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[8] Barber never actually appeared before

The Fourth Circuit Court of Appeals rather summarily affirmed the district court's ruling that this questioning was proper:

> Here, Barber gave a justifiable reason to the prosecutors by testifying that, "had be been afforded the opportunity", he would have stated to the prosecutor his position on the matters in question before he was indicted.
>
> That opened the door for the establishment of the fact that, upon being called before the grand jury, Barber pleaded the Fifth Amendment. We are not impressed by the quibble that he was ready to tell all to the prosecutor but not to the grand jury.
>
> App. A, p. 24a.

3. The admissibility of the company guilty pleas

Prior to appellant's trial, a number of the distilleries named in the Barber indictment had entered guilty pleas to misdemeanor charges of "giving any bonus,

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the grand jury. When the subpoena was served, Barber's attorney wrote the United States Attorney, informing him that Barber would assert his Fifth Amendment privilege. The government then did not attempt to force him to appear.

premium or compensation to any ... trade buyer" through their participation in the withdrawal system, in violation of Title 27 U.S.C. section 205(c)(2). At the trial, the government was permitted to bring out through its own witnesses the fact that their companies had entered such pleas and had been punished for their transgressions, in order to prove that the companies had been "harmed" by Barber's actions in continuing the withdrawal system.

The Fourth Circuit's opinion adopts the government's argument, and holds that evidence of the companies' guilty pleas "was relevant and proper" to show that the alleged victims of the withdrawal system actually had been harmed.

4. The mail fraud instructions.

At trial, Barber unsuccessfully sought to have the court instruct the jury on what activities would be sufficient to establish one charge of the indictment:

defrauding the public of its right to his "honest and faithful services". The Fourth Circuit opinion upholds the use of jury instructions without any such definition, and further holds that the mere use of "false" withdrawal forms and affidavits was sufficient to establish this offense, since it deprived the public of the opportunity to monitor the affairs of a state agency.

5. Possible juror bias.

During the voir dire examination of potential jurors in this case, one of the panel stated that her brother, James McClaskie, had been convicted in the same court a year previously on a gambling charge. When the United States Attorney then suggested that he personally had prosecuted her brother, the juror stated that "this fact" would not cause her to be prejudiced for or against the government. Neither the government nor the defense

challenged the juror, and she was one of the twelve jurors who returned the verdict of conviction.

While Barber's appeal to the Fourth Circuit was pending, the defense learned that the same United States Attorney had appeared on behalf of McClaskie at his sentencing hearing, prompting the court to remark that he had just "received some help from an unexpected source."

The Fourth Circuit ruled that "nothing more than a potentially suspicious circumstance had been shown, and something more than an unverified conjecture is required to justify grant of a new trial. 'A showing of a possibility of prejudice is not enough.'"

6. The R.I.C.O. "enterprise".

Prior to trial, Barber moved to dismiss the R.I.C.O. count of the indictment, on the grounds that the office of the state A.B.C. Commissioner was not an "enterprise" within the scope of that

statute. The district court, in an opinion printed in Appendix B hereto, ruled that a governmental office could consitute a R.I.C.O. enterprise. During the trial, the district court went even further, and instructed the jury as a matter of law that Barber's office constituted an enterprise within the meaning of R.I.C.O. (Trial transcript, 65, 1775, 1786).

Barber did not initially raise this issue on appeal, because the Fourth Circuit had previously held that a governmental office was a R.I.C.O. enterprise, and because application of the Fourth Circuit's ruling in United States v. Webster, 639 F.2d 174 (1981), cert. denied 102 S.Ct. 307 -- that the "enterprise" must have benefitted from the racketeering activity -- would have required reversal of the R.I.C.O. count in any event.

On the same day this case was decided by the Fourth Circuit, the court overruled the Webster holding on rehearing. A short time later, the Sixth Circuit Court of Appeals, in United States v. Thompson, became the first Court of Appeals to hold that R.I.C.O. enterprises do not include state governmental offices. (The Thompson opinion is printed in Appendix I hereto.) Barber accordingly included this issue in his petition for rehearing before the Fourth Circuit. The court denied the motion without opinion.

7. The use of immunized testimony

Both the district court and the Court of Appeals held that the government had met the burden of showing that this prosecution was not tainted by any use of Barber's immunized testimony, by testimony of the federal agents and attorneys that they made no use of the F.B.I. form 302's which were in their possession, and by the government's showing that it developed

information regarding Barber's solicitation of campaign contributions independently of the immunized testimony.

ARGUMENT

A. The Hobbs Act presumption

The Fourth Circuit held in this case that a state official's mere receipt of property from companies doing business with the state creates a presumption of compulsion which is sufficient by itself - absent a "convincing explanation" otherwise by the defendant - to meet the reasonable doubt standard of proof for a Hobbs Act conviction for extortion under color of official right. The Fourth Circuit's holding is unprecedented, and its potential impact upon the conduct of governmental offices -- including the solicitation of campaign contributions by office-holders -- merits this Court's review.

Every other Circuit Court of Appeals' affirmance of a Hobbs Act "color of official right" extortion conviction has been based upon evidence that the defendant official used his official office as either a "carrot" or a "stick" (or both), obtaining money or other property through express or implied promises to use his official power to the benefit or detriment of the potential payor.

The "carrot" cases involve the acceptance of property by an official with the knowledge that the payment is made to influence the performance of his official duties.[9] In this type of extortion under

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[9] E.g., United States v. Grande, 620 F.2d 1026 (4th Cir. 1980)(payments from contractors in return for official's supplying inside cost data on bids); United States v. Butler, 618 F.2d 411 (6th Cir. 1980)(payment to official in exchange for occupancy permit for non-qualifying building); United States v. Bright, 630 F.2d 804 (5th Cir. 1980)(payments to sheriff "in return for implied, if not express, promise not to enforce the law" against payor); United States v. French, 628 F.2d 1069 (8th Cir. 1980)(payment to

color of official right, no duress is required, and it is irrelevant that the "conduct may also constitute 'classic bribery,' United States v. Braasch, 505 F.2d 139, 151 (7th Cir. 1974), cert. denied, 421 U.S. 910. However, all of the "carrot" cases share one essential feature: in each case, the defendant obtained property "with the knowledge that it was paid to induce him to perform or

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city marshal in return for favorable "settlement" of money due city on forfeited bonds); United States v. Gates, 616 F.2d 1103 (9th Cir. 1980)(payments to official in return for non-enforcement of zoning and permit requirements); United States v. Hedman, 630 F.2d 1184 (7th Cir. 1980)(payments to city inspectors in return for non-enforcement of code and permit requirements); United States v. Hall, 536 F.2d 313 (10th Cir. 1976), cert. denied, 429 U.S. 919 (payments to governor in return for influencing state retirement system trustees to buy payor's notes); United States v. Mazzei, 521 F.2d 639 (3d Cir. 1975)(en banc), cert. denied, 434 U.S. 1014 (payments to state senator in return for preferential treatment in awarding of state leases). See also, United States v. Gillock, 100 S.Ct. 1185 (1980)(on motion to suppress evidence)(payments to state legislator in return for blocking extradition and sponsoring special legislation).

fail to perform official functions," United States v. Price, 617 F.2d 455, 458 (7th Cir. 1979), or to "misuse his office to favor" the payor, United States v. Grande, 620 F.2d 1026 , 1031 (4th Cir. 1980).

There was absolutely no evidence in this case that any of the liquor companies which made political contributions or participated in the withdrawal system expected or received any favored treatment in return. The government never advanced this theory of extortion and the district court did not instruct the jury on it. See n.5, supra. Nevertheless, the Fourth Circuit opinion holds that, "absent a convincing explanation" by the defendant, the jury could properly have convicted Barber of extortion on the unsupported presumption that the companies' motivation was "an expectation of a quid pro quo." App. A, pp. 15a, 16a.

This holding is unprecedented, and is in direct conflict with the position of the Eighth Circuit Court of Appeals, that an official's receipt of payments does not constitute extortion if the "evidence failed to show that the payments affected the [official's] 'discretionary judgment or resulted in any official preferential treatment,'" United States v. French, 628 F.2d 1069, 1075 n.5 (8th Cir. 1980)(citation omitted).

The Fourth Circuit's presumption is equally unprecedented when applied to the "stick" line of extortion cases, which involve public officials who exact money or other property as a condition of receiving fair treatment, or of avoiding mistreatment, from the defendant's office.[10] An element of actual compulsion

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[10] E.g., United States v. Cerelli, 603 F.2d 415 (3d Cir. 1979), cert. denied, 444 U.S. 1043 (equipment lessor required to pay kickbacks to officials as conditon of receiving state contracts); United States v. Price, supra (builder had reasonable belief that payment to city inspectors

is clear in each of these cases, ranging from the "unspoken threat" of United States v. Price, supra at 458 (city inspector's acceptance of payment, given with comment that payor knew that "in Chicago that I got to do it and that's all"), to the more explicit expression in United States v. Addonizio, 451 F.2d 49 , 57 (3d Cir. 1972), cert. denied 405 U.S. 936 (kickbacks demanded by city officials

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required to avoid harassment); United States v. Phillips, 577 F.2d 495 (9th Cir. 1978), cert. denied, 439 U.S. 831 (redevelopment agency would consider payment claims only if contractors paid off agency members); United States v. Rabbitt, 583 F.2d 1014 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (supporters of legislation required to hire house speaker or his friend to avoid burial of bills in committee); United States v. Hathaway, 534 F.2d 368 (1st Cir. 1976), cert. denied 429 U.S. 819 (contractors required to pay officials in order to be considered for building contract awards); United States v. Braasch, supra (liquor establishments required to pay police to avoid harassment); United States v. Hyde, 448 F.2d 815 (5th Cir. 1971)(companies required to pay state attorney general under treat of license revocation proceedings); United States v. Kenny, 463 F.2d 1972 (3d Cir. 1972)(contractors required to pay kickbacks to officials as condition of obtaining contracts).

under threats ranging from "everybody in Newark pays ten percent or they don't work in Newark," to "you pay your ten percent or I'll break both your legs").

Virtually every other Circuit Court considering the "stick" variety of extortion has held that, as the district court instructed the jury in this case, see n.6, supra, the government must prove that the property was given "under some form of compulsion, United States v. Rabbitt, 583 F.2d 1014 (8th Cir. 1978), in that the victim reasonably felt compelled to give up the property because of the defendant's wrongful use of his official position, United States v. Price, supra. In this case, the Fourth Circuit has effectively removed this requirement.

The Fourth Circuit rule, as stated in this case, is that the government can meet its burden of proof for a Hobbs Act conviction simply by showing that an official received something of value from

a person doing business with the defendant's office. The defendant then bears the burden of disproving a presumption of extortion, by providing a "convincing explanation".

Moreover, the defendant's burden is apparently a heavy one under the Fourth Circuit's rule. Although the court acknowledges that "a majority of the companies considered the withdrawal practice to be a valid 'promotional' device," App. A, p. 21a, it still concludes that "no such convincing explanation [rebutting the presumption that "the 'gift' .. was in return for favors or for the withholding of punitive measures"] has been forthcoming here." Id., p. 16a.

The court's opinion does not purport to find any actual evidence in the record to support a finding the the liquor companies' authorization of withdrawals was based upon either fear of retaliation

or an expectation of favors. The court, in fact , simply ignores considerable evidence to the contrary. In affirming the conviction, the court rests proof of this essential element of the government's case, e.g., United States v. Price, supra, entirely upon the presumption. This Court has held that the prosecution "may not rest its case [with respect to an essential element of an offense] entirely on a presumption unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt." County Court of Ulster County v. Allen, 99 S.Ct. 2213 (1979). The facts proved in this case -- that Barber was a public official and that he received political contributions and permission to withdraw liquor from companies doing business with his office -- are simply not sufficient to support the inference, beyond a reasonable

doubt, that the companies acted out of an actual and reasonable fear of retaliation or expectation of favors.

The Fourth Circuit opinion also has awesome implications for the future conduct of political campaigns. The court's opinion suggests that its presumption of extortion might not apply to an official's solicitation of campaign contributions (overlooking the fact that some of the charges affirmed in this case involved just that). App. A, p. 13a. However, in applying a presumption which serves as proof of the donor's motivation, there is no logical basis for distinguishing between donations of campaign funds and donations of any other type of property.

"[I]f a public official who asks for a political contribution from one who does, or may do, business with the government can be prosecuted on proof of those fact alone, then the Hobbs Act has

become an extraordinary mechanism for controlling political activity on the state and local levels." Ruff, Federal Prosecution of Local Corruption, 65 Georgetown L.J., 1171, 1196 (1977). The Fourth Circuit's opinion is the first case holding that the Hobbs Act has become such "an extraordinary mechanism for controlling political activity." The importance of this issue -- and the conflict between the Fourth Circuit's interpretation and that of the other Circuits -- merits review by this Court.

B. The questions regarding petitioner's assertion of the Fifth Amendment privilege

What the Fourth Circuit views as "quibbling", this Court has viewed as a serious constitutional issue -- i.e., whether a person's unwillingness to appear before a grand jury which has clearly "targeted" him for indictment is inconsistent with that same person's asserted willingness to discuss the case

under less accusatorial circumstances. In Grunewald v. United States, 353 U.S. 391 (1957), this Court relied upon the distinction between the two circumstances to reverse a conviction because of improper impeachment questioning:

> [T]he Fifth Amendment claim was made before a grand jury where Halperin was a compelled, and not a voluntary, witness; where he was not represented by counsel; where he could summon no witnesses; and where he had no opportunity to cross-examine witnesses testifying against him. ... [T]he nature of the tribunal which subjects the witness to questioning bears heavily on what inferences can be drawn from a plea of the Fifth Amendment. Innocent men are more likely to plead the privilege in secret proceedings, where they testify without advice of counsel and without opportunity for cross-examination, than in open court proceedings, where cross-examination and judicially supervised procedures provide safeguards for the establishing of the whole, as against the possibility of merely partial, truth.
>
> Finally, and most important, we cannot deem Halperin's plea of the Fifth Amendment to be inconsistent with his later testimony at the trial because of the nature of this particular grand jury proceeding. For, when

> Halperin was questioned before the grand jury, he was quite evidently already considered a potential defendant. ... [T]he scheme was...in essence already revealed when Halperin was called to testify. Under these circumstances it was evident that Halperin was faced with the possibility of an early indictment, and it was quite natural for him to fear that he was being asked questions for the very purpose of providing evidence against himself. It was thus quite consistent with innocence for him to refuse to provide evidence which could be used by the government in building its incriminating chain. For many innocent men who know that they are about to be indicted will refuse to help create a case against themselves under circumstances where lack of counsel's assistance and lack of opportunity for cross-examination will prevent them from bringing out the exculpatory circumstances in the context of which superficially incriminating acts occurred.
> 353 U.S. at 422-23.

The situation faced by Barber when he was subpoenaed to appear before the grand jury was even grimmer than that faced by Halperin. The federal investigation of Barber had been proceeding for two years, and a large number of liquor companies had

already been indicted, and in some cases convicted, based upon either their participation in the withdrawal system or for making political contributions through Barber. Barber, who was clearly the prime target of the entire investigation, reasonably expected to be indicted momentarily. His unwillingness to appear under these circumstances, and to help the government build its case against him, is not at all inconsistent with his statements at trial the he "had never denied" making the liquor withdrawals, and that the federal prosecutors had "spent two years trying to get that information and they they had come to [him] on the first day [he] would have told them."

Moreover, even assuming that Barber's testimony "opened the door" for the government to establish that he had declined to appear before the grand jury, the prosecutor's repeated questioning

about this fact -- a series of six questions -- gave impermissible emphasis to this fact.

The Fifth Circuit has recognized that, if the defense "opens the door" to questioning about the defendant's assertion of his Fifth Amendment privilege, this is still only one of a number of factors which must be considered in determining whether the prejudicial effect of the questioning, weighed against its probative value, denied the defendant of a fair trial. United States v. Dixon, 593 F.2d 626 (5th Cir. 1979). The Fourth Circuit did not even purport to apply such a balancing test in this case.

The Fourth Circuit's apparent decision to simply ignore this Court's opinion in Grunewald, and to characterize the issue as mere quibbling, requires review.

C. The liquor company guilty pleas.

The Fourth Circuit's ruling on this issue -- that the company guilty pleas were properly introduced in support of the mail fraud charges as proof that the companies were harmed by the withdrawal system -- represents the first time that any court has permitted the introduction of a co-participant's conviction as substantive evidence of a defendant's guilt. Other Circuit Courts of Appeal have recognized the danger of admitting such testimony even for the limited purposes of impeachment. E.g., United States v. Corona, 551 F.2d 1386, 1388 (5th Cir. 1977)("the prejudice to the remaining parties who are charged with complicity in the acts of the self-confessed guilty participant is obvious"); United States v. Handley, 591 F.2d 1125, 1128 (5th Cir. 1979)(prosecutor's reference to guilty pleas of defendant's alleged co-conspirators in plain error); United States v. Binger, 469 F.2d 275, 276 (9th

Cir. 1972)(recognizing the "real danger that jurors will give undue emphasis to a crime partner's guilty plea. It impinges on a defendant's right to be tried solely on the evidence").

Even aside from the prejudicial effect of such evidence, it is inconceivable that this type of "injury" was ever intended by Congress to be within the scope of the extortion or mail fraud statutes. The Fourth Circuit's bootstrap reasoning, which permits an individual to be convicted of mail fraud on the basis of a co-participant's conviction of that charge, is a novel and alarming construction of the prerequisites for criminal liability, particularly when applied to an offense such as mail fraud which requires specific intent. The decision merits review by this Court.

D. The mail fraud instructions.

The Fourth Circuit's broad ruling regarding the scope of the mail fraud statute's application to the "honest and faithful" performance of a public official's duties is inconsistent with established case law from other circuits, particularly the Court of Appeals for the Eighth Circuit. In a series of cases involving officials' receipt of undisclosed payments, the Eighth Circuit has reversed convictions, holding that "[i]n the absence of evidence that [the defendant] accorded preferential treatment to the payor of the gratuities or otherwise did not conscientiously perform the duties of his office, [his conduct] could not be held a 'scheme to defraud' within the meaning of the mail fraud statute." United States v. Brown, 540 F.2d 364, 374 (8th Cir. 1976)(citing United States v. McNeive, 536 F.2d 1245 (8th Cir. 1976). Accord: United States v. Rabbitt, 583 F.2d 1014, 1024 (8th Cir.

1978)(under established mail fraud standards, state legislator's concealed receipt of kickbacks was not violation unless it caused tangible loss to state or caused him to fail "to carry out the duties and responsibilities of his legislative office ... for the sake of [the payor]").

There was no evidence whatsoever in this case that Barber's participation in the withdrawal system had any effect on the performance of his duties. The testimony of the government's own witnesses established that Barber was always "scrupulously" impartial, and that his judgment on official matters was never influenced by the withdrawals. These factors distinguish this case from virtually every other reported case of a public official convicted of defrauding citizens of their right to the "honest and faithful" conduct of his duties.

According to the Eighth Circuit, "[e]very case of breach of public trust and misfeasance in public office in connection with which some mailing has occurred does not and cannot fall within the confines of the mail fraud offense," United States v. Rabbitt, supra. According to the Fourth Circuit, virtually any conduct by a public official which does not meet a particular jury's standards of "honest and faithful service," and in connection with which some mailing occurred, does fall within the confines of the mail fraud statute. This construction of the statute's scope is so amorphous, and such a departure from established standards in other circuits, to merit this Court's review.

E. Possible juror bias.

After the Fourth Circuit's decision in this case, this Court ruled that where the possibility of prejudice on the part of a juror is discovered after trial,

constitutional due process requirements are satisfied by a hearing at which the possibility of prejudice may be explored. Smith v. Phillips, 102 S.Ct. 940 (1982). Under the Fourth Circuit's ruling, a defendant who discovers grounds for a possible challenge to the partiality of a juror after trial is at a severe disadvantage. There is simply no way to make the concrete showing required by the court. The constitutional guarantee of a fair and impartial jury requires that the defendant at least be given an opportunity to develop a record during post-trial proceedings.

Here, where the Court's supervisory authority over the federal system is also involved, the deliberate withholding of material information regarding possible juror bias by a United States Attorney merits, at the least, a remand for a hearing to determine whether bias in fact exists.

F. The R.I.C.O. "enterprise".

In United States v. Thompson, __ F. 2d __, No. 81-5167 8th Cir. 1982), the Sixth Circuit noted that the remedial provisions of R.I.C.O. make its application to a state governmental office an anomaly, and accordingly held that such offices cannot constitute the "enterprise" upon which a R.I.C.O. conviction can be based. Appendix I. In reaching this conclusion, the court noted that only two other federal courts had undertaken similar examinations of the history and structure of R.I.C.O. to determine whether the statute's remedial power precludes it application to local governments: the Second Circuit, in United States v. Angellili, 660 F.2d 23 (2d Cir. 1981), and the district court in this case.

The direct conflict between the district court's published opinion in this case and the Sixth Circuit's opinion in

Thompson would, in itself, be a sufficient reason for review by this Court. However, the Barber court's ruling during the trial that, as a matter of law, the A.B.C.C. constitutes an enterprise, also appears to be in conflict with this Court's statement in United States v. Turkette, 452 U.S. 576, 583 2524 (1981), that "the existence of an enterprise at all times remains a separate element which must be proved by the government... The [enterprise] is proved by evidence of an on-going organization, formal or informal, and by evidence that the various associates fuction as a continuing unit."

It is fundamental that an essential element of a crime "can never be ruled as a question of law", no matter how "clear the proof may be, or however incontrovertible [it] may seem to the judge." Morissette v. United States, 342 U.S. 246, 274 (1952). The district court's action in this case, in ruling as

a matter of law that an element of the crime had been established, violated this principle, and the decision should be reviewed by this Court.

G. The use of immunized testimony

This Court had never determined what standard must be met by the government to disprove the presumption of taint which arises when an individual testifies under a grant of immunity and is later prosecuted and convicted by the same jurisdiction, based partially on the same subject matter of the immunized testimony. This case presents that question clearly.

Othe federal courts have held that, where the prosecution has actually read the immunized testimony during its investigation, there is a virtually conclusive presumption of taint due to the "immeasurable subjective effect" the prosecution's knowledge of the immunized testimony has, and the impossibility of the defendant, without access to the

government files, ever establishing that the immunized testimony was actually used. E.g., United States v. McDaniel, 482 F.2d 305 (8th Cir. 1973); United States v. Dornau, 359 F.Supp. 684 (S.D.N.Y. 1973), rev'd on other grounds, 491 F.2d 473 (2d Cir. 1974). Since testimony obtained under a grant of immunity reflects the Fifth Amendment "in its most pristine form", United States v. Portash, 440 U.S. 450 (1978), this Court has held that the government has a "heavy burden" of showing that the testimony was not used "in any way", and the defendant need not rely on the government's bald denials. United States v. Kastigar, 406 U.S. 441.

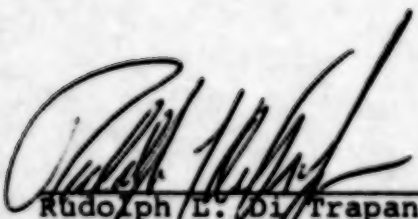
Both the district court and the Fourth Circuit Court of Appeals in this case forced the defendant to rely on the government's good faith in denying any use of the testimony, in the face of an extraordinary interest shown by the government in the immunized testimony.

The rulings below violate the spirit of Kastigar, and merit review by this Court.

Conclusion

For the reasons state above, J. Richard Barber respectfully asks this Court to issue a writ of certeriorari to the United States Court of Appeals for the Fourth Circuit, to review that court's affirmance of his conviction.

J. RICHARD BARBER
BY COUNSEL



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